

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 2018-7774

DIVISION/SECTION: "T"/14

SIXTH UNION BAPTIST CHURCH, EVE PROFIT, ANTRANETTE SCOTT, VAGNO
SANTOS, DAVID AND JANINE WILLIAMS

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED: _____
DEPUTY CLERK

EXCEPTIONS TO CLASS ACTION PETITION

NOW INTO COURT, through undersigned counsel, comes the Sewerage and Water Board of New Orleans (the "S&WB"), sought to be made defendant herein, appearing solely to take exception to the petition of plaintiffs Sixth Union Baptist Church, Eve Profit, Antranette Scott, Vagno Santos, and David and Janine Williams (collectively, "**Plaintiffs**") by raising the objections of (1) no cause of action pursuant to La. R.S. 29:735; and, separately, (2) no cause of action pursuant to La. R.S. 9:2798.1. To the extent this Court overrules the aforementioned exceptions, the S&WB raises the objections of (3) no cause of action for absolute liability; (4) no cause of action for strict liability; and (5) no cause of action for negligence.

WHEREFORE, the S&WB respectfully prays that this Court sustain the objections raised by the S&WB and dismiss Plaintiffs' claims against the S&WB with prejudice and at Plaintiffs' cost. Alternatively, the S&WB prays that this Court (1) order Plaintiffs under threat of dismissal to amend their petition within ten days of the order of this Court to cure the aforementioned defects in their petition; and (2) grant the S&WB any and all other forms of relief to which it is entitled.

Respectfully submitted,



Michael E. Botnick (#3284)
A. Gregory Grimsal (#6332)
Alex B. Rothenberg (#34740)
Micah C. Zeno (#36739)

GORDON, ARATA,
MONTGOMERY BARNETT,
MCCOLLAM, DUPLANTIS & EAGAN, LLC
201 St. Charles Avenue, Suite 4000
New Orleans, Louisiana 70170
Telephone: (504) 582-1111
Facsimile: (504) 582-1121
mbotnick@gamb.law
ggrimsal@gamb.law
arothernberg@gamb.law
mzeno@gamb.law

Catherine E. Lasky (#28652)
Kerry A. Murphy (#31382)
LASKY MURPHY, LLC
715 Girod Street, Suite 250
New Orleans, Louisiana 70130
Telephone: (504) 603-1500
Facsimile: (504) 603-1503
klasky@laskymurphy.com
kmurphy@laskymurphy.com

Yolanda Y. Grinstead, Special Counsel (#24111)
Darryl Harrison, Deputy Special Counsel (#8410)
Sewerage and Water Board of New Orleans
652 St. Joseph Street, Room 201
New Orleans, LA 70165
(504) 585-2236
(504) 585-2426 Fax

*Counsel for Defendant,
Sewerage and Water Board of New Orleans*

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Exceptions to Class
Action Petition on all counsel of record this 30/1 day of November 2018.



Micah C. Zeno

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 2018-7774

DIVISION/SECTION: "T"/14

SIXTH UNION BAPTIST CHURCH, EVE PROFIT, ANTRANETTE SCOTT, VAGNO
SANTOS, DAVID AND JANINE WILLIAMS

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED: _____

DEPUTY CLERK

ORDER

Having considered the foregoing Exceptions to Class Action Petition filed by the
Sewerage and Water Board of New Orleans,

IT IS HEREBY ORDERED that the plaintiffs shall appear at _____ a.m. on the
_____ day of _____ 20____ and show cause, if any, why this Court
should not sustain the objections raised by defendant Sewerage and Water Board of New Orleans
and dismiss with prejudice and at the plaintiffs' cost all of the plaintiffs' claims against the
Sewerage and Water Board of New Orleans.

New Orleans, Louisiana on this _____ day of _____ 2018.

JUDGE PIPER D. GRIFFIN

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 2018-7774

DIVISION/SECTION: "T"/14

SIXTH UNION BAPTIST CHURCH, EVE PROFIT, ANTRANETTE SCOTT, VAGNO
SANTOS, DAVID AND JANINE WILLIAMS

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED: _____

DEPUTY CLERK

MEMORANDUM IN SUPPORT OF EXCEPTIONS TO CLASS ACTION PETITION

MAY IT PLEASE THE COURT, the Sewerage and Water Board of New Orleans (the "S&WB") respectfully submits this memorandum in support of its Exceptions to Class Action Petition. The S&WB takes exception to the petition of Sixth Union Baptist Church, Eve Profit, Antranette Scott, Vagno Santos, and David and Janine Williams (collectively, "**Plaintiffs**") in that pursuant to La. R.S. 29:735, Immunity of personnel, Plaintiffs have no cause of action and, separately, Plaintiffs have no cause of action pursuant to the immunity provisions of La. R.S. 9:2798.1, Policymaking or discretionary acts or omissions of public entities or their officers or employees. To the extent this Court overrules the preceding exceptions, the S&WB raises the objections of no cause of action for absolute liability, no cause of action for strict liability, and no cause of action for negligence.

I. APPLICABLE LAW AND ARGUMENT

A. Plaintiffs have no cause of action against the S&WB because under La. R.S. 29:735 the S&WB is immune from liability for emergency preparedness and recovery activities.

The peremptory exception of no cause of action questions the legal sufficiency of the petition to allege facts and set forth claims for which the law provides a remedy. The exception is triable on the face of the petition, and the well-pleaded facts alleged within the petition are accepted as true. The exception should be maintained for failure to state a cause of action where it appears beyond doubt

that the petitioner can prove no set of facts in support of any claim for which the law provides relief.¹

Under La. R.S. 29:735

Neither the state nor any political subdivision thereof, nor other agencies, nor, except in case of willful misconduct, the agents' employees or representatives of any of them engaged in any homeland security and emergency preparedness and recovery activities, while complying with or attempting to comply with this Chapter or any rule or regulation promulgated pursuant to the provisions of this Chapter shall be liable for the death of or any injury to persons or damage to property as a result of such activity.²

An emergency includes:

- (a) The actual or threatened condition which has been or may be created by a disaster; or
- (b)
 - (i) Any natural or man-made event which results in an interruption in the delivery of utility services to any consumer of such services and which affects the safety, health, or welfare of a Louisiana resident; or
 - (ii) Any instance in which a utility's property is damaged and such damage creates a dangerous condition to the public.³

Emergency preparedness is "the mitigation of, preparation for, response to, and the recovery from emergencies or disasters," and is synonymous with the terms "civil defense" and "emergency management."⁴

La. R.S. 29:735 lacks temporal limits and is applicable for activities occurring before, during, and after an emergency.⁵ To be sure, "[n]either the definition of 'emergency' nor the definition of 'emergency preparedness' requires a declaration of an emergency to take place for the [immunity provisions of La. R.S. 29:735] to take effect."⁶ Instead, the application of immunity depends on whether an emergency situation existed and whether the defendant

¹ *Gulf Coast Bank & Trust Co. v. Warren*, 12-1570 (La. App. 4 Cir. 9/18/13); 125 So.3d 1211, 1216 (citing *Fink v. Bryant*, 01-0987 (La. 11/28/01); 801 So.2d 346, 348-49).

² La. R.S. § 29:735(A)(1).

³ La. R.S. § 29:723(3).

⁴ La. R.S. § 29:723(4).

⁵ *Cooley v. Acadian Ambulance*, 2010-1229 (La. App. 4 Cir. 5/4/11); 65 So.3d 192, 199 ("From [the jurisprudence], it is clear that applying immunity was not dependent upon an official declaration of emergency, but whether an emergency situation existed, and whether the defendant government was operating in a manner that promoted emergency preparedness and protection of persons and property.") See Peter M. Mansfield, *Natural Disasters and Government Torts: Immunity for Delictual Injury after Disaster Damage*, 63 LOY. L. REV. 247, 248-49 (1990) ("The lack of a bright-line, temporal expiration on § 29:735 immunity broadens its reach . . .") (citation omitted).

⁶ *Cooley v. Acadian Ambulance*, 2010-1229 (La. App. 4 Cir. 5/4/11); 65 So.3d 192, 198.

government was operating in a manner that promoted emergency preparedness and protection of persons and property.⁷

Immunity under La. R.S. 29:735 is an objection properly raised in an exception of no cause of action.⁸

For example, in *Robertson v. St. John the Baptist Parish* the plaintiffs filed suit against St. John the Baptist Parish two months after Hurricane Isaac made landfall.⁹ The plaintiffs claimed that the Parish was negligent in failing to warn residents of the probability of flooding and failing to proactively mitigate the danger and damage to residents.¹⁰ The plaintiffs further alleged that the Parish knew or should have known flooding would occur.¹¹ In response, the Parish filed an exception of no cause of action arguing that it was entitled to absolute immunity under La. R.S. 29:735.¹² The plaintiffs then sought leave to amend their petition to cure the defects raised by the Parish's exception.¹³ The trial court granted the Parish's exception of no cause of action, finding that the Parish's immunity under La. R.S. 29:735 barred the plaintiffs' claims.¹⁴ The court also denied the plaintiffs' request to amend their petition because the plaintiffs could not allege any facts sufficient to overcome the Parish's immunity.¹⁵

On appeal, the court in *Robertson* declared: "Political subdivisions are afforded absolute immunity for damages resulting from emergency preparedness activities."¹⁶

There can be no dispute [plaintiffs] seek damages allegedly caused by the Parish's failures with respect to its emergency preparedness and management activities as defined in La. R.S. 29:723(4). The trial court did not err in finding the [plaintiffs']

⁷ *Cooley v. Acadian Ambulance*, 2010-1229 (La. App. 4 Cir. 5/4/11); 65 So.3d 192, 199.

⁸ See *Freeman v. State*, 2007-1555 (La. App. 4 Cir. 4/2/08); 982 So.2d 903, 908 (upholding dismissal of the plaintiff's claims on an exception of no cause of action based on La. R.S. 29:735); *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 789 (stating that "immunity defense pursuant to La. R.S. 29:735 is an affirmative defense" and maintaining an exception of no cause of action based on the same).

⁹ *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 787.

¹⁰ *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 787.

¹¹ *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 787.

¹² *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 787.

¹³ *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 787.

¹⁴ *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 787.

¹⁵ *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 787.

¹⁶ *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 789 (citations omitted).

claims relate to the Parish's emergency preparedness activities and the Parish enjoyed absolute immunity from [plaintiffs'] claims pursuant to La. R.S. 29:735.¹⁷

The court further concluded that the trial court was correct to refuse the plaintiffs' request to amend their petition. Citing article 934 of the Louisiana Code of Civil Procedure, the court stated that the plaintiffs had failed to provide any explanation regarding how they could amend their petition to state a cause of action against the Parish, and the court noted that the only exception to the absolute immunity statute applied to *employees* of the Parish—not to the Parish itself.¹⁸

Similarly, the court in *Fryoux v. Tensas Basin Levee District* held that the Tensas Basin Levee District was entitled to dismissal of the plaintiffs' claims against it.¹⁹ In *Fryoux*, the plaintiffs filed suit against the Tensas Basin Levee District for damages that occurred when their home flooded during or after Hurricane Gustav.²⁰ The plaintiffs alleged that prior to the hurricane, the Levee District failed to take appropriate safeguards regarding certain drainage gates, and that this failure caused the plaintiffs' property to flood.²¹ In response, the Levee District filed a motion for summary judgment asserting that the plaintiffs' claims involved acts of emergency preparedness for which the Levee District was immune under La. R.S. 29:735.²² The trial court granted summary judgment in favor of the Levee District and the plaintiffs appealed.²³

On appeal in *Fryoux*, the Levee District argued that the plaintiffs' allegations involved emergency preparedness and response activities for which the Levee District was immune under La. R.S. 29:735.²⁴ The court in *Fryoux* stated that it was unclear who was responsible for the

¹⁷ *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 789.

¹⁸ *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 789-90, n.3 (citing La. C.C.P. art. 934 ("If the ground of the objection raised through the exception cannot be so removed . . . the action, claim, demand, issue or theory *shall* be dismissed.") (emphasis added)).

¹⁹ *Fryoux v. Tensas Basin Levee Dist.*, 12-997 (La. App. 3 Cir. 2/6/13); 2013 WL 440129, at *3.

²⁰ *Fryoux v. Tensas Basin Levee Dist.*, 12-997 (La. App. 3 Cir. 2/6/13); 2013 WL 440129, at *1.

²¹ *Fryoux v. Tensas Basin Levee Dist.*, 12-997 (La. App. 3 Cir. 2/6/13); 2013 WL 440129, at *1.

²² *Fryoux v. Tensas Basin Levee Dist.*, 12-997 (La. App. 3 Cir. 2/6/13); 2013 WL 440129, at *1.

²³ *Fryoux v. Tensas Basin Levee Dist.*, 12-997 (La. App. 3 Cir. 2/6/13); 2013 WL 440129, at *1.

²⁴ *Fryoux v. Tensas Basin Levee Dist.*, 12-997 (La. App. 3 Cir. 2/6/13); 2013 WL 440129, at *2.

drainage structures in question, and that a genuine issue existed as to who or what had caused the plaintiffs' damages.²⁵ Nevertheless, the court concluded that

[t]here is no genuine issue of material fact, however, that any flooding that occurred during and/or after Hurricane Gustav occurred during a declared state of emergency Accordingly we find no error with the trial court's determination that the Levee District is entitled to judgment dismissing the Fryoux's claims against it.²⁶

In this case, Plaintiffs allege that on August 5, 2017, a rainstorm and flooding occurred in the City of New Orleans. Plaintiffs allege that this rainstorm and flooding adversely affected the health, safety, and welfare of Plaintiffs in that they suffered damage to their homes, loss of vehicles and personal belongings, and pecuniary injury.²⁷ Plaintiffs further claim that the S&WB acted negligently in preparing for, responding to, and recovering from this emergency, and that the S&WB failed to properly warn Plaintiffs about this emergency.

As the court in *Robertson* held that there was no dispute that the plaintiffs there sought damages related to emergency preparedness and management activities under La. R.S. 29:735, this Court should find that there is no dispute that Plaintiffs in this case seek damages related to emergency preparedness and management activities of the S&WB.²⁸ As a result, this Court should also find that the S&WB's immunity under La. R.S. 29:735 bars Plaintiffs' claims.

As the court in *Fryoux* determined that the plaintiffs' allegations against the Levee District involved emergency preparedness and response activities for which the District was immune from liability under La. R.S. 29:735, this Court should find that the acts of which Plaintiffs' complain constitute emergency preparedness and recovery activities such that the S&WB is immune from liability pursuant La. R.S. 29:735.²⁹ Moreover, this Court should make

²⁵ *Fryoux v. Tensas Basin Levee Dist.*, 12-997 (La. App. 3 Cir. 2/6/13); 2013 WL 440129, at *3.

²⁶ *Fryoux v. Tensas Basin Levee Dist.*, 12-997 (La. App. 3 Cir. 2/6/13); 2013 WL 440129, at *3. "From [the jurisprudence], it is clear that applying immunity was not dependent upon an official declaration of emergency, but whether an emergency situation existed, and whether the defendant government was operating in a manner that promoted emergency preparedness and protection of persons and property." *Cooley v. Acadian Ambulance*, 2010-1229 (La. App. 4 Cir. 5/4/11); 65 So.3d 192, 199.

²⁷ Class Action Pet. 2-3.

²⁸ *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 789.

²⁹ *Fryoux v. Tensas Basin Levee Dist.*, 12-997 (La. App. 3 Cir. 2/6/13); 2013 WL 440129, at *3.

such finding based upon the exception raised herein because immunity under La. R.S. 29:735 is an affirmative defense properly raised by exception.³⁰

B. Plaintiffs have no cause of action against the S&WB because under La. R.S. 9:2798.1 the S&WB is immune from liability for policymaking and discretionary acts including those acts alleged in the Class Action Petition.

Under La. R.S. 9:2798.1 “[l]iability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.”³¹ As used in the statute, “public entity” includes the state and any of its political subdivisions, and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions.³² The S&WB, as a board of the City of New Orleans, a political subdivision, falls within this definition.

There is a two-step inquiry for determining whether the discretionary function immunity of La. R.S. 9:2798.1 applies.

A court must first consider whether the government employee had an element of choice. “[T]he discretionary function exception will not apply when a [statute], regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive.” If the employee had no discretion or choice as to appropriate conduct, there is no immunity. When discretion is involved, the court must then determine whether that discretion is the kind which is shielded by the exception, that is, one grounded in social, economic or political policy. If the action is not based on public policy, the government is liable for any negligence, because the exception insulates the government from liability only if the challenged action involves the permissible exercise of a policy judgment.”³³

³⁰ See *Freeman v. State*, 2007-1555 (La. App. 4 Cir. 4/2/08); 982 So.2d 903, 908 (upholding dismissal of the plaintiff’s claims on an exception of no cause of action based on La. R.S. 29:735); *Robertson v. St. John the Baptist Parish*, 15-240 (La. App. 5 Cir. 10/14/15); 177 So.3d 785, 789 (stating that “immunity defense pursuant to La. R.S. 29:735 is an affirmative defense” and maintaining an exception of no cause of action based on the same).

³¹ La. R.S. § 9:2798.1(B).

³² La. R.S. § 9:2798.1(A).

³³ *Fowler v. Roberts*, 556 So.2d 1, 15-16 (La. 1989), reh’g (La. 1990) (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1995) and noting that the discretionary function exception to La. R.S. 9:2798.1 is the same as the exception in the Federal Tort Claims Act).

For example, based on the immunity provided in La. R.S. 9:2798.1 the court in *Marino v. Parish of St. Charles* dismissed the plaintiffs' claims against St. Charles Parish.³⁴ In that case, the plaintiffs alleged that as a result of the Parish's negligence the plaintiffs' homes were damaged or destroyed by flooding.³⁵ Specifically, the plaintiffs alleged that the Parish had failed to (1) clean and repair culverts; (2) keep gaps in a nearby levee free from obstructions; and (3) have adequate operators present to maintain flood pumps.³⁶ The trial court in *Marino* found that La. R.S. 9:2798.1 was applicable to the plaintiffs' claims and granted summary judgment in favor of the Parish.³⁷

On appeal, the court in *Marino* concluded that the Parish's actions involved elements of judgment and choice and were, therefore, discretionary.³⁸ The court noted that the Parish had shown the necessary social and economic considerations surrounding its decisions regarding the choice and operation of the drainage system sufficient to support immunity under La. R.S. 9:2798.1³⁹

Here, in support of their claims against the S&WB, Plaintiffs question the operational decisions of the S&WB by criticizing the S&WB for exercising its discretion to not operate certain pumps because of power issues at the facility where those pumps were located.⁴⁰ Plaintiffs challenge the staffing policies of the S&WB by asserting that the S&WB should have, but failed to staff certain pumps in a manner preferred by Plaintiffs.⁴¹ Plaintiffs protest the budgeting, funding, and financial decisions of the S&WB.⁴² Plaintiffs attack the information technology and communications systems adopted by the S&WB.⁴³ Plaintiffs also object to decisions of the S&WB concerning: (1) analysis of the effects of the drainage system; (2) alternatives to the drainage system; (3) operations of the drainage system including the use of

³⁴ *Marino v. Parish of St. Charles*, 09-197 (La. App. 5 Cir. 10/27/09); 27 So.3d 926, 928, 932.

³⁵ *Marino v. Parish of St. Charles*, 09-197 (La. App. 5 Cir. 10/27/09); 27 So.3d 926, 928.

³⁶ *Marino v. Parish of St. Charles*, 09-197 (La. App. 5 Cir. 10/27/09); 27 So.3d 926, 928.

³⁷ *Marino v. Parish of St. Charles*, 09-197 (La. App. 5 Cir. 10/27/09); 27 So.3d 926, 928.

³⁸ *Marino v. Parish of St. Charles*, 09-197 (La. App. 5 Cir. 10/27/09); 27 So.3d 926, 932.

³⁹ *Marino v. Parish of St. Charles*, 09-197 (La. App. 5 Cir. 10/27/09); 27 So.3d 926, 932.

⁴⁰ Class Action Pet. 10 ¶ 33.

⁴¹ Class Action Pet. 12 ¶¶ 44-45, 13 ¶ 46.

⁴² Class Action Pet. 8 ¶ 20.

⁴³ Class Action Pet. 8 ¶ 22.

safeguards; (4) staffing of the drainage system; (5) the equipment and infrastructure of the drainage system; (6) and when, where, and how the S&WB maintains the drainage system.⁴⁴ As a prerequisite to their allegations, Plaintiffs declare that the “SWB . . . is constitutionally and statutorily charged with the responsibility of the construction, control, maintenance, and operations of drainage within the City of New Orleans.”⁴⁵ Thus, as a matter of law all of the acts about which Plaintiffs’ complain constitute policymaking or discretionary acts within the course and scope of the powers and duties of the S&WB.

Just as the court in *Marino* concluded that the alleged failures of the Parish were discretionary acts for which the Parish was immune under La. R.S. 9:2798.1, the actions of the S&WB of which Plaintiffs complain are policymaking or discretionary acts such that the S&WB is immune from liability under La. R.S. 9:2798.1.

C. No cause of action for absolute liability in Count II.

In Count II at Paragraph 60, Plaintiffs assert that the “SWB is absolutely liable to [Plaintiffs] for damages caused by the SWB’s negligent actions and omissions” and cite La. C.C. arts. 667 and 2315. However, Civil Code article 667 specifically and strictly limits absolute liability to damages that are caused by “pile driving or blasting with explosives.”⁴⁶ Plaintiffs’ petition makes no allegations regarding pile driving or blasting with explosives.

The Supreme Court in *Suire v. Lafayette City-Parish Consolidated Government* examined the 1996 amendment to Article 667 before concluding that the only actions subject to absolute liability are pile driving and blasting with explosives.

We begin the analysis in support of our conclusion with the relevant language of article 667: “[T]he proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.” La. Civ. Code art. 667. This article imposes absolute liability only where the proprietor engages in an “ultrahazardous activity.” *Id.* The article

⁴⁴ Class Action Pet. 14-15.

⁴⁵ Class Action Pet. 4 ¶ 6.

⁴⁶ See La. C.C. art. 667 (“Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. **An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.**”) (emphasis added).

provides that ultrahazardous activities are “**strictly limited**” to pile driving and blasting with explosives. *Id.* (emphasis added).

The article’s language limiting ultrahazardous activities to pile driving and blasting was added as part of sweeping tort reform undertaken by the Louisiana legislature in 1996. *See* Acts 1996, 1st Ex.Sess., No. 1, § 1. In light of the 1996 amendment, Louisiana courts are relieved of the responsibility to decide whether a certain activity is ultrahazardous for purposes of deciding whether the absolute liability standard applies. *See, e.g., Mossy Motors, Inc. v. Sewerage and Water Bd. of City of New Orleans*, 1998–0495 (La. App. 4 Cir. 5/12/99), 753 So.2d 269 (discussing the 1996 amendment and noting that “[t]he new definition by amendment defines an ultrahazardous activity legislatively”). Article 667 now clearly articulates that the only cognizable ultrahazardous activities are pile driving’ and “blasting with explosives.” Any other activities besides the two the article specifically lists are not ultrahazardous for purposes of article 667. Thus, to qualify for the absolute liability standard, the plaintiff must show that the activity complained of is either “pile driving” or “blasting with explosives.”⁴⁷

Plaintiffs’ petition does not contain any allegations of pile driving or blasting with explosives against the S&WB. Therefore, the S&WB’s exception of no cause of action for absolute liability under Civil Code article 667 must be sustained.

D. No cause of action for strict liability or liability pursuant in Count III.

In Count III, Plaintiffs allege that the S&WB is strictly liable pursuant to articles 2317, 2317.1, and 2322 of the Civil Code. First, courts of this State have repeatedly recognized that “the 1996 legislation enacting La. C.C. art. 2317.1 and amending La. C.C. art. 2322, effective April 16, 1996, abolished the concept of strict liability governed by prior interpretation of the pre–1996 versions of La. C.C. arts. 2317 and 2322.”⁴⁸ Because under the post-1996 current law, claims made under articles 2317, 2317.1, and 2322 must be predicated on a finding of

⁴⁷ *Suire v. Lafayette City-Par. Consol. Govt.*, 04-1459 (La. 4/12/05); 907 So. 2d 37, 48–49.

⁴⁸ *Broussard v. Voorhies*, 06-2306 (La. App. 1 Cir. 9/19/07); 970 So.2d 1038, 1042 (citing *Dennis v. The Finish Line, Inc.*, 99–1413, 99–1414, p. 5 n.8 (La. App. 1 Cir.12/22/00); 781 So.2d 12, 20 n.8, *writ denied*, 01–0214 (La. 3/16/01); 787 So.2d 319; 12 William E. Crawford Louisiana Civil Law Treatise: Tort Law §§ 19.1, 19.2 (2nd ed. 1996)). *See also Melancon v. Perkins Rowe Assoc., LLC*, 16-0219 (La. App. 1 Cir. 12/14/16); 208 So.3d 925, 930 (recognizing that “the 1996 amendment enacting article 2317.1 ‘abolished the concept of strict liability governed by prior interpretation of La. C.C. art. 2317.’”) (citing *Jackson v. Brumfield*, 09–2142 (La. App. 1 Cir. 6/11/10); 40 So.3d 1242, 1243; *Birdsong v. Hirsch Mem’l Coliseum*, 39,101 (La. App. 2 Cir. 12/15/04); 889 So.2d 1232, 1235 (“Because of the abolishment of strict liability, plaintiffs would be required to show that Hirsch knew of the problem with condensation or ‘in the exercise of reasonable care’ should have known of the defective condition.”)).

negligence, Count III of the petition seeking strict liability against the S&WB is subject to a no cause of action exception.⁴⁹

i. Plaintiffs have failed to plead the elements of negligence under Civil Code articles 2317 and 2317.1.

In addition to the fact that Civil Code articles 2317 and 2317.1 do not provide for strict liability, Plaintiffs have failed to plead the elements necessary for a cause of action pursuant to article 2317 or 2317.1 in Count III of their petition. In order to state a claim pursuant to article 2317 or 2317.1 of the Civil Code, which is cited in Paragraph 64 of Plaintiffs' petition, Plaintiffs must plead that the S&WB had "actual or constructive notice" of the alleged defects in the pumping system **and** that those defects presented an "unreasonable risk of harm to others." Plaintiffs do not plead that the S&WB had either actual or constructive notice of the alleged defects. Furthermore, there are no allegations of "unreasonable risk of harm to others."⁵⁰

In *Wilson*, the Fourth Circuit delineated the "elements that the plaintiff must prove to recover damages from the government entity" including:

- (1) that the defendant owned or had custody of the thing that caused the damage;
- (2) that the thing was defective in that it created an unreasonable risk of harm to others;
- (3) that the defendant had actual or constructive knowledge of the defect or unreasonable risk of harm and failed to take corrective action within a reasonable time, and
- (4) causation.⁵¹

Because the Plaintiffs have not alleged that the condition of the pumps or anything else within the S&WB's care and custody "created an unreasonable risk of harm to others" or that the S&WB "had actual or constructive knowledge of the defect or unreasonable risk of harm and failed to take corrective action within a reasonable time," the S&WB's exception of no cause of action as to Plaintiffs' claims in Count III pursuant to Civil Code articles 2317 and 2317.1 should be sustained.

⁴⁹ See e.g., *Carroll v. Am. Empire Surplus Lines Ins. Co.*, 289 F. Supp. 3d 767, 771 (E.D. La. 2017) ("A finding of custodial liability under article 2317.1 and 2322 is predicated upon a finding of negligence.' A custodian's duty is the same as that under the general negligence theory of article 2315.").

⁵⁰ See *Wilson v. City of New Orleans*, 95-2129 (La. App. 3 Cir. 4/30/97); 693 So.2d 344.

⁵¹ *Id.* at 346 (citations omitted). See also La. R.S. § 9:2800(C) ("[N]o person shall have a cause of action based solely upon liability imposed under Civil Code Article 2317 against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.").

ii. Plaintiffs have failed to plead the elements of negligence under Civil Code article 2322.

Finally, in Count III, Plaintiffs cite Civil Code article 2322, but that article only applies to damage caused by ruin of a building.

The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction. However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.⁵²

Nowhere in Plaintiffs' petition nor specifically in Count III do Plaintiffs allege that the damages alleged to have been suffered by Plaintiffs were "occasioned by" the "ruin" of a building or a "structure of some permanence" sufficient to state a claim pursuant to article 2322 of the Civil Code. Therefore, the S&WB's no cause of action as to the entirety of Count III should be granted.⁵³

II. CONCLUSION

For the previously discussed reasons this Court should sustain the objections raised by the S&WB and dismiss Plaintiffs' claims against the S&WB with prejudice and at Plaintiffs' cost. Alternatively, this Court should order Plaintiffs under threat of dismissal to amend their petition within ten days of the order of this Court to cure the aforementioned defects in Plaintiffs' petition.

Respectfully submitted,



Michael E. Botnick (#3284)
A. Gregory Grimsal (#6332)
Alex B. Rothenberg (#34740)
Micah C. Zeno (#36739)
GORDON, ARATA,
MONTGOMERY BARNETT,
MCCOLLAM, DUPLANTIS & EAGAN, LLC
201 St. Charles Avenue, Suite 4000
New Orleans, Louisiana 70170

⁵² La. C.C. art. 2322.

⁵³ See e.g., *Mudd v. Travelers Indem. Co.*, 309 So.2d 297, 300-301 (La. 1975).

Telephone: (504) 582-1111
Facsimile: (504) 582-1121
mbotnick@gamb.law
ggrimsal@gamb.law
arothenberg@gamb.law
mzeno@gamb.law

Catherine E. Lasky (#28652)
Kerry A. Murphy (#31382)
LASKY MURPHY, LLC
715 Girod Street, Suite 250
New Orleans, Louisiana 70130
Telephone: (504) 603-1500
Facsimile: (504) 603-1503
klasky@laskymurphy.com
kmurphy@laskymurphy.com

Yolanda Y. Grinstead, Special Counsel (#24111)
Darryl Harrison, Deputy Special Counsel (#8410)
Sewerage and Water Board of New Orleans
652 St. Joseph Street, Room 201
New Orleans, LA 70165
(504) 585-2236
(504) 585-2426 Fax

*Counsel for Defendant,
Sewerage and Water Board of New Orleans*

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Memorandum in Support of Exceptions to Class Action Petition on all counsel of record this 30th day of November 2018.



Micah C. Zeno